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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,
Petitioners,

vs.

EUGENE WOODARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1) Can the federal judiciary interfere with a state's clemency process?

2) Does a prisoner have a right to immunity for any testimony given during a clemency interview?

3) Does the doctrine of unconstitutional conditions extend beyond the First Amendment?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the unprecedented intrusion of judicial review into the clemency process, and expanding the doctrine of unconstitutional conditions beyond the First Amendment. Both results hamstring important government activities and are thus contrary to the interests CJLF was formed to protect.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

Respondent Woodard was sentenced to death for killing Mani Akram during a carjacking in southwestern Cleveland. *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1194 (CA6 1997) (Nelson, J., concurring in part and dissenting in part). While arguing over the division of spoils, Woodard was overheard saying "I'm the one with the murder case" and "if the nigger die, it's me that shot him, so I should get the most." *Ibid.* The Ohio Supreme Court set an execution date for October 7, 1994, but issued a stay on August 24, 1994, so that respondent could pursue state post-conviction relief. *Id.*, at 1181 (majority opinion). Since the execution was not stayed 45 days in advance, the Ohio Adult Parole Authority (APA) started the clemency process as required under Ohio's Death Penalty Clemency Procedure. On September 6, the APA informed respondent's counsel that a clemency hearing would be held on September 16. *Ibid.* Counsel was also told that if Woodard desired a pre-hearing interview with the APA, he could have it on September 9. *Id.*, at 1181-1182.

Respondent filed a 42 U. S. C. § 1983 action on September 14, 1994, moving for a temporary restraining order against any clemency proceedings in his case. *Id.*, at 1182. On September 16, a consent decree was entered, indefinitely postponing clemency proceedings. *Ibid.* The District Court rejected respondent's procedural due process, substantive due process, and Eighth Amendment claims. *Ibid.*

The Sixth Circuit reversed. It held that under *Evitts* v. *Lucey*, 469 U. S. 387 (1985) respondent had a protected liberty interest in clemency proceedings. See 107 F. 3d, at 1186-1188. The lower court also held that if Ohio fails to give respondent immunity during the clemency interview, it may create an unconstitutional condition in violation of respondent's Fifth Amendment privilege against self-incrimination and remanded for further determination of the nature of the APA's clemency procedures. See *id.*, at 1192-1193.

SUMMARY OF ARGUMENT

The federal judiciary cannot interfere with the clemency process. Clemency is an act of grace traditionally left to the unguided discretion of the executive. It is therefore not a proper subject for judicial review. *Evitts* v. *Lucey* does not extend to clemency procedures and therefore does not justify the decision below.

Any attempt to elevate Ohio's clemency procedures into constitutionally protected interests improperly discourages government benevolence. In *Sandin* v. *Conner*, this Court disapproved punishing a state for its good deeds by elevating prison rules to constitutional rights. The lesson of *Conner* applies with equal force to the present case.

A prisoner whose conviction is final has no privilege against self-incrimination regarding the circumstances of the conviction or sentence. The decision below, that Ohio threatened respondent's self-incrimination privilege by refusing to immunize his testimony during his commutation interview, violates numerous principles of the Fifth Amendment privilege. This effective right of immunity contradicts the rule that granting immunity is not a judicial function.

This ruling also fails to appreciate that the commutation interview does not threaten respondent with self-incrimination. Once his conviction became final, respondent's self-incrimination privilege expired with regard to his conviction and sentence. The possibility of collateral attack does not change the calculus, as habeas is a civil proceeding and the privilege does not exclude evidence in civil matters.

The commutation interview also lacks the compulsion that triggers the Fifth Amendment privilege. Respondent does not have to attend the interview. If he does attend, there is no reason to believe that he will be further punished if he invokes the privilege. The fact that invoking the privilege may harm his chances for commutation does not penalize his silence. The Constitution does not immunize individuals from having to make difficult choices.

The doctrine of unconstitutional conditions should not be expanded beyond the First Amendment. Its modern roots in *Perry*

v. *Sindermann* are in the First Amendment, as are its modern applications.

The original unconstitutional conditions cases do not change the analysis. Many of these decisions actually involved equal protection violations, not unconstitutional conditions. The other cases advanced the now discredited theory of economic due process.

The doctrine should remain limited to the First Amendment. Expanding the doctrine beyond the First Amendment will prevent many useful bargains for government benefits. Limiting the doctrine to the First Amendment allows it to protect the special privileges associated with this right, while minimizing the doctrine's cost.

ARGUMENT

I. The federal judiciary cannot interfere with the clemency process.

The first and clearest error in the opinion below was its unprecedented interference with a state's clemency procedure. *Amicus* will keep its discussion of this important point brief, as it expects petitioner to address this point in detail.

Any analysis of the judiciary's role in regulating clemency proceedings must begin with the great discretion traditionally given the executive branch for executing its clemency function. The exercise of clemency such as "a pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States* v. *Wilson*, 7 Pet. 150, 160 (1833). This act of grace, "generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981).

The responsibility for such an important, inevitably subjective decision is best left to the sole discretion of the chief executive. See The Federalist No. 74, pp. 447-448 (C. Rossiter ed. 1961) (A. Hamilton). "Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, *if ever*, appropriate subjects for judicial review." *Dumschat*, 452 U. S., at 464 (emphasis added; footnote omitted). In *Dumschat*, this Court found that the Connecticut Board of Pardons' practice of routinely commuting the sentences of most life prisoners did not create a protected liberty interest. See *id.*, at 465. This decision was centered on the deference courts accord these inherently subjective decisions, see *id.*, at 464, and the fact that the Board of Pardons had "unfettered discretion" to commute sentences.[2] See *id.*, at 466.

Clemency simply is not meant to be reviewed by the courts. Courts cannot develop standards to review a function that is the essence of subjectivity. "Individual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick* v. *Reed*, 419 U. S. 256, 268 (1974).

The *Dumschat* Court left open the possibility that equal protection could provide a reason to exercise judicial review over clemency. See 452 U. S., at 464, n. 9. While a court may entertain a challenge to a clemency procedure that on its face threatens equal protection rights, such as a rule limiting commutation to prisoners of a particular race, the present case does not raise this issue. Capital prisoners are different from the general prisoner population, and thus may be treated differently, a fact recognized by the court below. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1193 (CA6 1997).

Recognizing the barrier placed around clemency procedures by *Dumschat*, the Sixth Circuit sought an alternative to this decision in *Evitts* v. *Lucey*, 469 U. S. 387 (1985). See *Woodard*, 107 F. 3d, at 1186. *Evitts* held that the right to appointed counsel in the first appeal as of right first recognized in *Douglas* v. *California*, 372 U. S. 353, 357-358 (1963), included a right to effective assistance of counsel. 469 U. S., at 397. The problem

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2. This last reason, that taking discretion away from those overseeing prisoners creates a constitutionally protected liberty interest, was discredited in *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293, 2299-2300 (1995). See *post*, at 8.

with the Sixth Circuit's use of *Evitts* is that this Court has refused to extend *Evitts* or *Douglas* beyond the first appeal as of right.

Ross v. *Moffitt*, 417 U. S. 600, 602-603 (1974) involved an attempt to extend *Douglas* to discretionary review and certiorari petitions to this Court. *Douglas* had both due process and an equal protection component. *Id.*, at 608-609. *Ross* indicated that if *Douglas* extended to discretionary appeals, it would be under its equal protection rationale. See *id.*, at 611. This Court concluded that "[d]espite the tendency of all rights 'to declare themselves absolute to their logical extreme,' " *id.*, at 611-612 (quoting *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.)), *Douglas* had limits. "The question is not one of absolutes, but one of degrees." 417 U. S., at 612. Equal protection did not extend the right to counsel to discretionary review. *Ibid.*

The logic of *Ross* extends to collateral review. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review." *Pennsylvania* v. *Finley*, 481 U. S. 551, 556-557 (1987). Therefore, neither due process nor equal protection justified extending the right to counsel to collateral review. See *id.*, at 557. In *Murray* v. *Giarratano*, 492 U. S. 1, 12 (1989) a plurality of this Court applied *Finley* to death row inmates, and in *Coleman* v. *Thompson*, 501 U. S. 722, 756-757 (1991), *Evitts* was not extended to an appeal from the denial of state habeas to a capital prisoner. Clemency is even farther removed from *Douglas* and *Evitts* than the limits established in *Ross*, *Finley*, *Murray*, and *Coleman*. Upholding the decision below would explode the boundaries of *Douglas* and *Evitts*, turning their limits into dead letters. Clemency is an executive, not a judicial function. This Court should reiterate this principle so mistakes such as the decision below are not repeated.

II. Elevating government benefits into constitutional rights improperly discourages government benevolence.

The decision below is an unfortunate example of invoking the Constitution to punish the good deeds of government. The Constitution does not require the state to have a clemency mechanism. See *Herrera* v. *Collins*, 506 U. S. 390, 414 (1993);

see also *Rogers* v. *Peck*, 199 U. S. 425, 436 (1905) (power of governor to grant pardons neither required nor withheld by the federal Constitution). As there is no constitutional right to clemency, Ohio's decision to allow the commutation of death sentences and to create a formal process for evaluating such requests for clemency is therefore voluntary. The Sixth Circuit's decision to burden Ohio's clemency process with the label of constitutionally protected interest punishes Ohio for its good intentions. While the Sixth Circuit meant to benefit capital prisoners, it may do more harm to them in the long run by discouraging Ohio and other states from regulating capital clemency. If a state can avoid judicial intrusion by leaving clemency to the unfettered discretion of the governor, or by abolishing clemency altogether, it may do so in order to avoid judicial intrusions similar to the one below.

This problem was a driving force behind this Court's recent turnaround in its prisoner rights jurisprudence. Beginning with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutionally protected liberty interests. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 425-428, 115 S. Ct. 2293, 2297-2299 (1995) (reviewing cases). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 426-427, 115 S. Ct., at 2298. Thus in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), state standards for granting parole were subjective and vague, calling for a prediction of future behavior, rather than an examination of the prisoner's past. While the Court accepted without explanation " 'respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, the procedures used were deemed adequate. *Id.*, at 16.

Conversely, in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), the Board had " 'unfettered discretion' " to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466. Therefore, this entirely

discretionary power created no entitlement to be protected under due process. See *id.*, at 467.

This Court began to recognize the consequences of such perverse incentives in *Hewitt* v. *Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedure provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of the discretion given to prison officials became the norm. See *Conner*, *supra*, 132 L. Ed. 2d, at 428, 115 S. Ct., at 2299 (discussing *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Department of Corrections* v. *Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid the creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 132 L. Ed. 2d, at 429, 115 S. Ct., at 2299. The perversity of such incentives helped justify *Conner*'s decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 429, n. 5, 115 S. Ct., at 2300, n. 5.

The *Conner* Court developed an intimate appreciation of the costs of *Wolff* and its successors. In addition to the disincentives for rulemaking, the old approach created the additional problem of dramatically increasing judicial interference with prisons. Thus, "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.*, at 429, 115 S. Ct., at 2299.

The present case poses similar concerns. Capital punishment is particularly diminished by delay. See *Gomez* v. *Fiero*, 136 L. Ed. 2d 204, 204, and n. 1, 117 S. Ct. 285, 285, and n. 1 (1996) (Stevens, J., dissenting); *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). By adding yet another layer of constitutional law to this field, the decision below threatens to turn clemency into

another source of collateral litigation, inevitably adding yet more expense and delay. This will undoubtedly deter states from exposing their commutation and pardon powers to the federal courts.

The fact that clemency is the traditional means for providing a "fail safe" to protect the factually innocent from capital punishment, see *Herrera*, 506 U. S., at 415, does not change this calculus. The *Herrera* Court understood that states were not required to provide either clemency or any particular clemency procedure. See *id.*, at 414. Some states have been unwilling to vest the clemency power solely in the executive, instead splitting the power between an advisory board and the governor. See *ibid.* Such states often have specific, detailed clemency procedures. See *id.*, at 416 (discussing Texas' clemency procedure). Encumbering these proceedings with the Due Process Clause will either deter states from having clemency procedures or rob executive clemency of its necessary informality. See *id.*, at 413 (quoting from *United States* v. *Wilson*, 7 Pet. 150, 160-161 (1833) (Marshall, C.J.)).

Rulemaking can be very beneficial. In *Conner*, this Court noted that prison rulemaking encourages uniform treatment of prisoners, limits staffers' authority over prisoners, and instructs personnel on how to exercise their discretion. See 132 L. Ed. 2d, at 428-429, 115 S. Ct., at 2299. Rules may provide a similar benefit to the clemency process, giving the prisoners some idea of their rights and responsibilities, and informing, or possibly even controlling, the executive's discretion. Yet a delicate balance must be struck between the rules and necessary discretion. Interjecting the Due Process Clause into this mix will disrupt the balance. The states, our national laboratories, see *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), should be allowed to experiment with their commutation and pardon powers. This Court should reiterate the principles of *Conner* to deter future disruptions from the federal courts.

III. A prisoner whose conviction is final has no privilege against self-incrimination regarding the circumstances of the conviction or sentence.

The decision below also erred by creating a right to immunity for capital prisoners seeking commutation. The Sixth Circuit accepted Woodard's argument that "the Ohio procedure calls for death row inmates to make a 'Hobson's Choice' between asserting the Fifth Amendment right [against self-incrimination] and participating in the clemency review process." *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1997). While it felt that it lacked the evidence to hold that this was a violation of defendant's self-incrimination privilege, the Sixth Circuit did require Ohio to find a compelling state interest to justify "requiring" a respondent to waive his self-incrimination privilege during his clemency interview. See *id.*, at 1189. The Sixth Circuit hinted that a grant of immunity under the auspices of the Fifth Amendment would protect respondent's privilege if Ohio failed the compelling interest test. See *id.*, at 1193.

This request for immunity contradicts the principle that courts are not in the business of immunizing witnesses, which is "peculiarly an executive" task. *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 261 (1983). More importantly, the decision below overlooks the two conditions necessary for invoking the privilege, self-incrimination and compulsion. Since the commutation interview does not conflict with either interest, Woodard's self-incrimination privilege is not threatened by the interview.

A. No Self-Incrimination.

When discussing the self-incrimination properties of the clemency interview, the Sixth Circuit ignores the fact that respondent has been convicted of the crimes he now seeks commutation for. The trial on the merits is the "main event" in criminal procedure. *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). Respondent's conviction ended his presumption of innocence. *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993). Barring retrial, any subsequent proceeding concerning respondent's conviction is truly collateral and thus cannot incriminate respondent with regard to his underlying conviction.

The opinion below states that "a prisoner who still has ongoing post-conviction proceedings (such as Woodard) *obviously* has a measurable interest in avoiding self-incrimination." See *Woodard*, *supra*, 103 F. 3d, at 1189 (emphasis added). This is far from obvious. The privilege only protects individuals from conviction; adverse collateral attacks are irrelevant to the privilege. Habeas corpus is a civil proceeding. *Browder* v. *Director, Ill. Dept of Corr.*, 434 U. S. 257, 269 (1978). It has been long settled that the privilege does not protect the disclosure of facts adverse to civil liability. See 8 J. Wigmore, Evidence §2254, at 331 (McNaughten rev. 1961). While the privilege may be claimed in "*any proceeding*" it simply protects " 'any *disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*' " *In re Gault*, 387 U. S. 1, 47, 48 (1967) (quoting *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 94 (1964) (White, J., concurring) (emphasis added by the *Gault* Court)).

Holding an adverse habeas proceeding to be a form of incrimination runs contrary to the purpose of the privilege. "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' " *Tehan* v. *Shott*, 382 U. S. 406, 415 (1966). In a habeas proceeding, it is the petitioner who has the burden of proof. See *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945). There is simply no reason to justify the lower court's expansion of the privilege. Therefore, "notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled, they are inadmissible in a subsequent trial for a crime *other than for which he has been convicted*." *Minnesota* v. *Murphy*, 465 U. S. 420, 426 (1984) (emphasis added).

Indeed, even threatened deprivation of liberty is not necessarily enough to invoke the privilege. A commitment proceeding that seeks to treat, as opposed to punish, sexually dangerous persons by committing them to the appropriate psychiatric institutions is not "criminal" for the purposes of the Fifth Amendment. See *Allen* v. *Illinois*, 478 U. S. 364, 372-373 (1986). A collateral

attack on a presumptively valid conviction cannot be even remotely criminal under the Fifth Amendment.

The decision below also runs contrary to the tenor of this Court's habeas jurisprudence. An important aspect of many recent habeas decisions is this Court's much more lenient treatment of petitioners with strong claims of innocence. See *Herrera* v. *Collins*, 506 U. S. 390, 404 (1993). Invoking the Fifth Amendment to prevent evidence of the correctness of the guilt finding or the sentence is contrary to the sense of justice found in these decisions. Once a prisoner's conviction is final, there is no reason to hide additional evidence of his guilt from courts conducting collateral review.

The Sixth Circuit also noted the possibility of respondent inculpating himself for crimes unrelated to his underlying conviction during his commutation interview. See *Woodard*, 107 F. 3d, at 1189. This risk is too remote to warrant a preemptive grant of immunity. Respondent's risk of further prosecution is rendered even more remote by the fact that admitting to uncharged crimes is unlikely to lead to a commutation. If respondent has a substantial, previously unknown, criminal history, it further demonstrates his danger to society, reinforcing the propriety of his death sentence. Finally, Woodard, like any other party to a civil proceeding, can invoke his Fifth Amendment privilege and refuse to answer incriminating questions.

B. No Compulsion.

Even if respondent's interview subjected him to additional criminal liability, his Fifth Amendment privilege would not be violated. An essential component of any claim under the self-incrimination privilege is compulsion. "No person . . . shall be *compelled* in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5 (emphasis added). The Sixth Circuit's failure to appreciate this point is its second fundamental misinterpretation of the self-incrimination privilege.

The fact that respondent could claim the privilege at any proceeding where a question may incriminate him, see *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), does not change the compulsion requirement. If respondent voluntarily incriminates himself, then the privilege does not apply.

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters of which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U. S. 424, 427 (1943) (footnote omitted); accord, *Minnesota* v. *Murphy*, 465 U. S., at 427.

Respondent is not compelled to testify at the commutation interview. He has not been subpoenaed. He was asked if he wanted an interview. See *Woodard*, 107 F. 3d, at 1181-1182. Whether he speaks is a decision left entirely to respondent. Respondent simply is not subject "to the cruel trilemma of self-accusation, perjury or contempt . . . ." *Murphy* v. *Waterfront Commission*, 378 U. S., at 55.

The fact that respondent seeks to overturn his death sentence cannot create compulsion where it otherwise does not exist. The general rule is that a witness must assert the self-incrimination privilege or lose it; one who voluntarily speaks cannot later complain that the incriminating testimony was compelled. See *Minnesota* v. *Murphy*, 465 U. S., at 429. While there are a handful of exceptions to this rule, none of them apply to the present case.

The best known example of a self-executing Fifth Amendment privilege is the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See 465 U. S., at 429-430. In *Minnesota* v. *Murphy*, *Miranda* was distinguished because the coercive circumstances of the station-house were absent. See *id.*, at 433. The commutation interview is similarly distinguishable from *Miranda*. The commutation interview is voluntary, and meant to determine whether an already convicted prisoner warrants an act of mercy. This does not "convey to the *suspect* a message that he has no choice but to submit to the officers' will and to confess." *Ibid.* (emphasis added). The prisoner at a commutation interview will not feel that he cannot leave until he confesses. Cf. *ibid.* *Miranda*, which deals with a different, potentially more coercive stage of a criminal procedure, cannot govern the present case.

The privilege is also self-executing in the " 'penalty' cases" where "the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amend-

ment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Fifth Amendment forbids.' " *Minnesota* v. *Murphy*, 465 U. S., at 434 (quoting *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 806 (1977)). In *Minnesota* v. *Murphy*, defendant had been a probationer subject to the condition that he attend a treatment program for sex offenders, report to his probation officer, and be truthful to the probation officer " 'in all matters.' " 465 U. S., at 422. During his treatment, defendant admitted to a counselor that he committed an earlier rape and murder, and the counselor relayed the confession to Murphy's probation officer. *Id.*, at 423. At a subsequent meeting with the probation officer about his failure to continue treatment, Murphy was confronted with his confession, which he reaffirmed.

The threat of probation revocation for untruthful answers did not constitute a penalty that made the privilege self-executing. Had the state forced Murphy to make these incriminating statements or lose his probationary status, then his privilege would have been executed. See *id.*, at 435. As the probation condition only penalized false statements, this Court concluded that Minnesota would not punish a probationer who invoked his Fifth Amendment privilege. See *id.*, at 437-438. Any belief that Minnesota would attempt to do so was unreasonable. *Id.*, at 438.

The argument against compulsion is even stronger in the present case. Unlike Murphy, respondent is not free. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464-465 (1981) (no constitutionally protected liberty interest in commutation). Clemency is an essentially unreviewable act of grace. See *ante*, at 4-5. If Ohio wishes to take into account respondent's failure to admit to his current or other crimes, it should be free to do so. So long as respondent receives no added punishment for invoking his privilege, such as through a contempt finding, Ohio does not violate his Fifth Amendment rights. As in *Minnesota* v. *Murphy*, it is unreasonable to believe Ohio will act this way. If respondent wishes to avoid incriminating himself, he must invoke his privilege at his commutation hearing. The Fifth Amendment affords no more protection.[3]

The Sixth Circuit's invocation of the Fifth Amendment privilege seeks to free death row inmates from a potentially unpleasant choice. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1987). It is a constitutional fact of life that the government may confront its citizens with unpleasant choices concerning their constitutional rights. "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). This applies with particular force to the self-incrimination privilege. " '*That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.*' " *United States* v. *Rylander*, 460 U. S. 752, 759 (1983) (quoting *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970) (emphasis added by the *Rylander* Court)).

Respondent does not deserve a free ride; Ohio can require him to make a choice.

Nor should the Eighth Amendment step in where the Fifth does not tread. The Eighth Amendment has been construed to regulate capital punishment at trial; once the trial is over, a capital defendant deserves no extra privileges. See *Murray* v. *Giarratano*, 492 U. S. 1, 9 (1989) (plurality). If the right to counsel is not extended to collateral review in a capital case, see *Coleman* v. *Thompson*, 501 U. S. 722, 752 (1991), there is even less reason to invoke the Eighth Amendment to extend the Fifth Amendment privilege where it otherwise would not reach.

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3. The last instance of self-executing privilege that occurs "in the context of the federal occupational and excise taxes on gamblers," *Minnesota* v. *Murphy*, 465 U. S., at 439, does not apply to present case. The gambling exception exists because "claiming the privilege in lieu of filing a tax return would tend to incriminate . . . ." *Ibid.* Woodard does not run this risk, as he may refuse to answer any incriminating question without risking further incrimination. See *ante*, at 12.

IV. The doctrine of unconstitutional conditions should be limited to the First Amendment.

The decision below extends the doctrine of unconstitutional conditions into previously uncharted territory. Its holding that the doctrine of unconstitutional conditions bars placing burdens on the self-incrimination privilege in exchange for government benefits, see *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1997), cannot be allowed to stand. Unconstitutional conditions is a difficult, potentially dangerous doctrine that should be confined to the First Amendment.

A. First Amendment Roots.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case. Whether the unconstitutional conditions benefits doctrine applied beyond the First Amendment was not an issue. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

Any indication from *Perry* that the government may not condition the receipt of a government benefit upon the waiver of

any government right is contrary to this Court's precedents. This Court has often upheld the waiver of a constitutional right in exchange for some government benefit. See part IV B, *post*. Neither *Perry* nor any other of this Court's decisions have invalidated such consents under the *Perry* dictum. Therefore, there is some limit to the *Perry* dictum. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994).

The limit of this dictum is seen in *Perry* itself. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Perry*, 408 U. S., at 597.

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. It noted that denying benefits because of the exercise of First Amendment rights "would allow the government to 'produce a result which [it] could not command directly.' " *Ibid.* (citing *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)). The *Perry* Court then noted that "[w]e have applied this general principle" to the denial of various monetary benefits, citing numerous cases. See 408 U. S., at 597.

None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits on giving up some other right, but instead involved denials of benefits that were directly challenged as unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961) (denial of cook's access to military installation did not violate due process). Other cases cited by *Perry* involved loyalty oaths. Some invoked the First Amendment and others the due process "vagueness" doctrine, but all involved a severe impact on speech or association. See *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62

(1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961); *Speiser*, *supra*, 357 U. S., at 529; *Wieman* v. *Updegraff*, 344 U. S. 183, 185-186, 191-192 (1952). The other cases involved a variety of First Amendment issues. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech); *United States* v. *Robel*, 389 U. S. 258, 266-268 (1967) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (1967) (association); *Elfbrandt* v. *Russell*, 384 U. S. 11, 16 (1966) (association); *Sherbert* v. *Verner*, 374 U. S. 398, 405-406 (1963) (free exercise of religion); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (establishment of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (partisan speech and association). See *Perry*, *supra*, 408 U. S., at 597. *Perry* had no support to extend its reach beyond the First Amendment.

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[4] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case, where this Court held that there was no First Amendment right to require Congress to give tax-exempt status to nonprofit organizations that engaged in lobbying. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*,

4. "The government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny," *id.*, at 143, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

The limits on *Perry* were in place even before that decision was written. An integral part of *Perry* was the rule that whether a benefit was a right or privilege was irrelevant to what conditions the government could place on the exercise of the benefit. As *Perry* noted, "respondent's lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim." 408 U. S., at 597-598. The precedent that discredited the right-privilege distinction was grounded in the First Amendment.

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that *the liberties of religion and expression* may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963) (emphasis added).

B. The Property Cases.

In a dim, discredited part of this Court's past, some decisions applied the unconstitutional conditions doctrine outside the First Amendment. These cases reached their apex in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311 (1931), in which an order of the Interstate Commerce Commission conditioning its approval of the bankrupt railroad's reorganization plan on the creation of an impound fund to be dispersed at the discretion of the bankruptcy court or the commission, see *id.*, at 319-322, was declared unconstitutional. See *id.*, at 327-328. In reaching this conclusion this Court stated, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.*, at

328-329. This rule was fashioned to protect the substantive due process doctrine typified by the discredited *Lochner* v. *New York*, 198 U. S. 45 (1905). See Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1416 (1989). It "was invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations . . . ." *Id.*, at 1505.

The *Lochner*-type cases have, of course, long since been repudiated. See *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4684-4686 (June 26, 1997) (Souter, J., concurring in the judgment) (tracing history). *Chicago, M. St. P. & P. R. Co.* and its antecedents "produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism *foredoomed to reversal*." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230 (1948) (emphasis added). *Mandeville Island Farms* notes *Chicago, M. St. P. & P. R. Co.* and implies it was contradicted by *United States* v. *Lowden*, 308 U. S. 225, 240 (1939). 334 U. S., at 230, n. 9. The rights these decisions sought to protect are no longer the law, and their legal philosophy has been thoroughly discredited by this Court. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731-732 (1963). They are no longer valid, and cannot be applied to the present case.

Many of these decisions grew from a response to an aberrant, discredited decision. In *Paul* v. *Virginia*, 8 Wall. 168, 181 (1869), this Court viewed corporations as the recipients of "special privileges" granted by the state. Since "it might be of the highest public interest that the number of corporations in the State should be limited," *id.*, at 182, this Court determined that a state's consent to the formation of a domestic corporation, or entry of a foreign corporation "may be granted upon such terms and conditions as those States may think proper to impose." *Id.*, at 181. This doctrine spawned a series of decisions upholding discriminatory conditions, usually in the form of taxes, on the entry of foreign corporations into a state. See *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U. S. 648, 660-662 (1981). The cases that turned back these decisions invoked a mix of the unconstitutional conditions doctrine and equal protection. See *id.*, at 662-666.

Before the first unconstitutional conditions cases were decided, the legal underpinnings of *Paul* had eroded. First, in the late 19th century, laws of general incorporation spread through the country, taking away the corporation's status as a special privilege. *Id.*, at 659. Second, the Fourteenth Amendment, ratified in 1868, prevented "the States from acting arbitrarily or treating similarly situated persons differently, *even with respect to privileges formerly dispensed at the State's discretion.*" *Id.*, at 660 (emphasis in original). This Court was slow to recognize these developments, see *ibid.*, thus the doctrine of unconstitutional conditions developed. See *id.*, at 661-662. The most important of these cases, *Southern R. Co.* v. *Greene*, 216 U. S. 400 (1910), see 451 U. S., at 662, rejected a state condition on equal protection grounds. See 216 U. S., at 417-418; see 451 U. S., at 663. Equal protection has thus become and remained the norm for analyzing state conditions on entry of foreign corporations. See 451 U. S., at 664-668. Because the conditions are themselves equal protection violations, and because incorporation is no longer a privilege, these cases are not truly part of the unconstitutional conditions doctrine.

Nor does *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) extend the government benefits doctrine beyond the First Amendment, despite the assertions of some. Cf. Sullivan, *supra*, 102 Harv. L. Rev., at 1463. In *Nollan*, the California Coastal Commission conditioned its permission to allow Nollan to build on his property on his granting a public easement through his property. 483 U. S., at 828. The Court found that this was a taking. *Id.*, at 837. It also found that this was not a government benefits decision, holding that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.' " *Id.*, at 833-834, n. 2.

This severs *Nollan* from the conditions cases. In *Perry* and its successors, the government conditioned some financial benefit, such as government employment, on the recipient agreeing to waive a First Amendment right. See, *e.g.*, *Perry*, *supra*, 408 U. S., at 594-595 (state junior college teacher allegedly discharged for public criticism of Board of Regents); *Board of County Commissioners* v. *Umbehr*, 135 L. Ed. 2d 843, 849, 116 S. Ct. 2342, 2345

(1996) (trash hauling contract with county terminated in retaliation for contractor's public criticism of County Board).

In *Nollan*, the "bargain," the requested building permit, and the condition, the easement, were both government restrictions on the Nollans' use of their property. See 483 U. S., at 831 (easement); *id.*, at 834 (regulations). Since both types of restriction could effect an unconstitutional taking, see *ibid.*, each had to pass constitutional muster. The regulatory scheme that forced the Nollans to get a building permit before they could build on their lot was presumed to advance a sufficiently important state interest to pass constitutional muster. See *id.*, at 835. If the easement could be justified by the same interest, then there would be a constitutionally acceptable nexus between the easement condition and the building permit. See *id.*, at 836-837.

The *Nollan* Court justified its nexus rationale by the logic that if a more restrictive regulation is permissible, then a less restrictive regulation in the form of a government condition must also be constitutional. As this Court concluded when analyzing a hypothetical condition involving a condition even more invasive than the easement in *Nollan*:

> "Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Ibid.*

This is the same logic as found in the most cogent criticism of the unconstitutional conditions doctrine. "Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 53 (1910) (Holmes, J., dissenting). While they may have surface

similarities, *Nollan* and *Perry* are two different species of constitutional cases.

Dolan v. *City of Tigard*, 512 U. S. 374 (1994) does not change the relationship between the Takings Clause and the unconstitutional conditions doctrine. In one passage, the *Dolan* Court includes the Takings Clause with the rights protected under unconstitutional conditions. See *id.*, at 385. *Dolan* followed *Nollan* and applied its nexus standard. See *id.*, at 386. The *Dolan* Court simply found that while there was a nexus between a legitimate state interest and the permit conditions, see *id.*, at 387, there was not a reasonable relationship between the two. See *id.*, at 394-395. Since there was no change from the *Nollan* analysis, the unconstitutional conditions in dictum in *Dolan* should not be allowed to govern the present case.

More recent pronouncements from this Court recognized that the unconstitutional conditions doctrine is an aspect of the First Amendment. "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes on his constitutionally protected . . . freedom of speech.' " *Umbehr*, *supra*, 135 L. Ed. 2d, at 851, 116 S. Ct., at 2347 (quoting *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972)). There are good reasons for these limits. As the next section will demonstrate, many constitutional rights outside the First Amendment have been waived in exchange for government benefits. It thus would be impractical and dangerous to now endanger these agreements.

C. The Benefit of the Bargain.

Although it is often good practice to avoid "the tyranny of labels" when deciding cases, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934), it is necessary to pay attention to the labels in the present case. The court below understood that the unconstitutional conditions doctrine had been largely confined to First Amendment cases. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1190 (CA6 1997). It invoked *Nollan* and *Dolan* to justify extending this doctrine to the Fifth Amendment's

privilege against self-incrimination. See *ibid.*[5] Unless carefully limited, the label "unconstitutional conditions" is likely to seep out of its First Amendment basis.

This doctrine should not go beyond its natural boundary found in the First Amendment. As Justice Holmes noted in his *Western Union* dissent, the doctrine has logical difficulties; if the government is not constitutionally compelled to provide a benefit, it should be able to add conditions to the benefit. See *ante*, at 22. So long as the decision to accept the benefit is voluntary, then an individual should be able to consent to foregoing a constitutional right in exchange for some government benefit.

A voluntary bargain is presumed to benefit both sides; if one side would be disadvantaged, then that side would not enter into the bargain. Therefore, the unconstitutional conditions doctrine threatens to harm those it seeks to protect by depriving them of the benefit of their bargains; if the government is not allowed to condition a benefit on some constitutional waiver it may withdraw or modify the benefit to the detriment of both the government and the beneficiary.

> "If people can obtain benefits from selling their rights, why should they be prevented from doing so? One aspect of the value of a right—whether a constitutional right or title to land—is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action." Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information, 1981 S. Ct. Rev. 309, 347 (footnotes omitted).

This Court also appreciates the axiom that if something cannot be sold, that is, surrendered in exchange for something of value, it becomes less valuable. See *Andrus* v. *Allard*, 444 U. S. 51, 66

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5. The Court of Appeal also cited *Shapiro* v. *Thompson*, *supra*, to justify extending the conditions doctrine beyond the First Amendment. See *ibid.* *Shapiro*, however, is distinguishable as involving an unconditional action that was itself unconstitutional. See *ante*, at 17.

(1979) (regulations preventing the sale of certain Indian artifacts reduces their value, but is not a taking). Overextending the unconstitutional conditions doctrine will "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942).

This helps explain why this Court has upheld constitutional bargaining when First Amendment rights are not involved.

The plea bargain, when defendant exchanges a plea of guilty for a reduced charge, is "an essential component of the criminal process which [p]roperly administered, . . . is to be encouraged." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). It involves a particularly important set of interests: the criminal defendant's trial rights and the prosecution's essential function of charging crimes. The importance of these interests initially raised grave concerns with the courts over their voluntariness. Cf. *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void").

Over time, this Court came to recognize that even agreements of this gravity were voluntary. Since both the prosecution and defense have something to gain from the plea bargain, "[i]t is this *mutuality of advantage*" that explains the prevalence and acceptability of these agreements to waive rights. See *Brady* v. *United States*, 397 U. S. 742, 752 (1970) (emphasis added). This mutual advantage meant that a plea motivated by a risk of a higher sentence if the case went to trial was still voluntary. *Id.*, at 751.

Mutually beneficial consents are found elsewhere in this Court's constitutional precedents. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), federal law required pesticide developers to include trade secrets among the data they submitted to the Environmental Protection Agency (EPA) to allow the agency to determine whether the pesticide was safe enough to market. *Id.*, at 995-996. This information could be used by the EPA to evaluate other companies' pesticides. *Id.*, at 1006. Consent made certain that prospective application of this scheme did not constitute a taking under the Fifth Amendment.

> "Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally

related to a legitimate Government interest, *a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.*" *Id.*, at 1007 (emphasis added).[6]

In *Zap* v. *United States*, 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947),[7] contractual consent to government searches was recognized as a valid waiver of Fourth Amendment rights. Petitioner Zap, who contracted with the Navy to do experimental work on airplane wings, was convicted of filing a false claim with the government. *Id.*, at 625-626. A key piece of evidence against Petitioner was a check made out to a test pilot that Zap used to defraud expense money from the government. See *id.*, at 628.

Zap's contract with the Navy contained the following consent: " 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' " *Id.*, at 627. Invoking this condition, the government sent two Federal Bureau of Investigation agents to Zap's business posing as Navy auditors. During the audit, the agents discovered the incriminating check. *Ibid.*

The *Zap* Court upheld the search because of the contractual consent. "[W]hen petitioner, *in order to obtain the Government's business*, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.*, at 628 (emphasis added). This contractual consent governed the legality of the search. Since the contract allowed inspection by any authorized government agents, the fact that the inspectors worked for the F.B.I. instead of the Navy

6. When the pesticide developers had reason to believe that the trade secrets they submitted would be kept secret, use of this information to benefit others would constitute a taking. See *id.*, at 1011.

7. The order vacating *Zap* cited *Ballard* v. *United States*, 329 U. S. 187 (1946). *Zap*, *supra*, 330 U. S., at 801. *Ballard* held that women could not be systematically excluded from federal grand and petit juries. 329 U. S., at 195.

Department did not detract from the legality of the search. *Id.*, at 628-629. The consent agreement made the search reasonable.

Although *Zap* was not mentioned, this Court applied closely analogous reasoning in *Wyman* v. *James*, 400 U. S. 309 (1971). *Wyman* dealt with a New York regulation conditioning receipt of Aid to Families with Dependent Children (AFDC) grants on the recipient's consent to home visits by social workers. See *id.*, at 310. The *Wyman* Court upheld this regulation against Fourth Amendment attack, holding that there was no "search . . . in the Fourth Amendment meaning of that term." *Id.*, at 317. Consent helped take the visit out of the Fourth Amendment.

> "We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. *If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be.* There is no entry of the home and there is no search." *Id.*, at 317-318 (emphasis added).

There is no meaningful difference between *Wyman* and *Zap*.[8] In both cases, the government conditioned an important fiscal reward on the recipient's consent to government intrusion. Whether labeled a consent search or no search at all, in both cases consent obtained in exchange for government consideration made the intrusion legal.

This Court has upheld the idea that the consent necessary for a bargain can be obtained in the face of substantial state power. Every day in this country defendants enter guilty pleas because of the dire possibilities if they go to trial. In *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), the prosecution threatened to charge defendant as an habitual criminal carrying a life sentence if he did not " 'save the court the inconvenience and necessity of a trial' " and plead guilty to a crime carrying a sentence of 2 to 10 years. *Id.*, at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and

8. *Wyman* also promulgated an alternative holding that even if the consent were not voluntary, the search would still be reasonable. *Id.*, at 318. This does not supplant the consent holding, but is instead based on a hypothetical assumption that the consent was invalid. See *ibid.*

received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365.

Ohio does not have to give respondent the opportunity to speak at his clemency hearing. It should be allowed to hold respondent responsible for what he says at the hearing. Any contrition, for instance, would be much less sincere if made under a grant of immunity. If Ohio and other states are not allowed to structure their commutation and other criminal procedures to get the benefit of the bargain, they may withdraw such benefits entirely, impoverishing all concerned. See Part II, *ante*.

D. Preserving the Doctrine.

Although the unconstitutional conditions doctrine can be costly and unwieldly, it does not have to be abandoned. There are good reasons for this Court's decision to limit this doctrine to the First Amendment. The First Amendment protects a particularly important and fragile set of rights. In the public employment cases,

> "[t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)." *Connick* v. *Myers*, 461 U. S. 138, 145 (1983).

The special needs of the First Amendment are found in other doctrines as well. The doctrine of overbreadth, for example, gives claimants who are not engaged in constitutionally protected conduct the extraordinary standing to attack a statute on the ground that it may violate the First Amendment rights of others not before the Court. See *Forsythe Co.* v. *Nationalist Movement*, 505 U. S. 123, 129 (1992). This doctrine, which is limited to the First Amendment, see *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), contrasts with the general rule of standing in constitutional cases that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Another example of the special needs of the First Amendment is found in the rule that the government may only regulate the content of protected speech if it uses "the least restrictive means" of advancing a compelling interest. See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 126 (1989); see also *Reno* v. *ACLU*, 521 U. S. ___, 65 U. S. L. W. 4715, 4723 (June 26, 1997). This is inapplicable to the Fifth Amendment privilege, which looks to official misconduct and voluntariness. See *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986).

The unconstitutional conditions doctrine should be similarly limited to the First Amendment. This would confine the doctrine to an essential but limited concern—the ability of the government to use its resources to "buy" the suppression of unwanted speech, beliefs, or associations. This focus is most vividly demonstrated in the area of subsidies. In *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983), this Court upheld tax regulations denying tax exemptions to organizations that engaged in lobbying. The basis of the decision was that government was free to give and withdraw subsidies so long as the action is "not ' "aimed at the suppression of dangerous ideas" ' . . . ." *Id.*, at 550 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959)). Outside of the suppression of ideas, the government's " 'power to encourage actions deemed to be in the public interest is necessarily far broader.' " 461 U. S., at 550 (quoting *Maher* v. *Roe*, 432 U. S. 464, 476 (1977)).

Similar considerations motivate the *Perry* line. Not all First Amendment activity is beyond the power of the government's purse. The primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern." *Connick*, *supra*, 461 U. S., at 145. The limits of *Perry* are not beyond, but are instead within, the First Amendment. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Self-Incrimination Clause does not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," the doctrine of these decisions does not apply to the present case.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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